

**SEP 14 2006**

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HUGO TOBON-VERGARA,

Defendant - Appellant.

No. 06-30184

D.C. No. CR-05-00044-RHW

MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of Washington  
Robert H. Whaley, US District Judge, Presiding

Submitted September 11, 2006\*\*

Before: PREGERSON, T.G. NELSON, and GRABER, Circuit Judges.

Hugo Tobon-Vergara appeals the sentence imposed following his guilty plea to being an alien found in the United States after deportation in violation of 8 U.S.C. § 1326.

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

\*\* This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Tobon-Vergara contends that the district court erred in sentencing him pursuant to 8 U.S.C. § 1326(b) to more than the two-year maximum set forth in 8 U.S.C. § 1326(a), when he did not admit and a jury did not find any prior convictions. He further argues that the avoidance-of-constitutional-doubt doctrine requires that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), be limited to the holding that a prior conviction that increases the maximum penalty need not be alleged in the indictment when the prior conviction, unlike here, is admitted as part of a guilty plea. Finally, although conceding that the issue is foreclosed by *United States v. Pacheco-Zepeda*, 234 F.3d 411 (9th Cir. 2000), and *United States v. Quintana-Quintana*, 383 F.3d 1052 (9th Cir. 2004), to preserve the issue, Tobon-Vergara also argues that in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and subsequent Supreme Court decisions, *Almendarez-Torres* has been overruled and § 1326(b) is unconstitutional.

These contentions are foreclosed. *See United States v. Beng-Salazar*, 452 F.3d 1088, 1091 (9th Cir. 2006) (rejecting as foreclosed the contention that recent decisions of the Supreme Court limit *Almendarez-Torres*'s holding to cases where a defendant has admitted his prior convictions during a guilty plea); *United States v. Velasquez-Reyes*, 427 F.3d 1227, 1229 (9th Cir. 2005) (rejecting contention that the government is required to plead prior convictions in the

indictment and prove them to a jury unless the defendant admits the prior convictions); *United States v. Rodriguez-Lara*, 421 F.3d 932, 949-50 (9th Cir. 2005) (affirming the continuing validity of *Almendarez-Torres* and rejecting a constitutional challenge to § 1326(b)); *United States v. Weiland*, 420 F.3d 1062, 1079 n. 16 (9th Cir. 2005), *cert denied*, 126 S. Ct. 1911 (2006) (noting that we are bound by the Supreme Court's holding in *Almendarez-Torres* that a district court may enhance a sentence on the basis of prior convictions, even if the fact of those convictions was not found by a jury beyond a reasonable doubt).

**AFFIRMED.**